

①  
90-273

No. \_\_\_\_\_

Supreme Court, U.S.

FILED

AUG 10 1990

JOSEPH F. SPANIOL, JR.  
CLERK

In The  
**Supreme Court of the United States**  
October Term, 1990

◆  
COMMISSIONER OF REVENUE  
OF THE STATE OF TENNESSEE,

*Petitioner,*

v.

NEWSWEEK, INC.; SOUTHERN LIVING, INC.;  
and PROGRESSIVE FARMER, INC.,

*Respondents.*

◆  
**PETITION FOR WRIT OF CERTIORARI  
TO THE SUPEME COURT OF THE  
STATE OF TENNESSEE**

◆  
CHARLES W. BURSON  
Tennessee Attorney General  
Counsel of Record

JOHN KNOX WALKUP  
Solicitor General

DARYL J. BRAND  
Assistant Attorney General

450 James Robertson Parkway  
Nashville, Tennessee 37243-0485  
(615) 741-2041

*Counsel for Petitioner*



**QUESTION PRESENTED**

Whether the Equal Protection Clause and the First Amendment require that state tax and exemption statutes providing content-neutral distinctions between different segments of the communications media, such as between newspapers and magazines, must satisfy strict scrutiny.

## TABLE OF CONTENTS

	Page
Question Presented .....	i
Table of Authorities .....	iii
Opinions Below .....	1
Jurisdiction.....	2
Constitutional Provisions, Statutes, and Regulations Involved in the Case.....	3
Statement of the Case .....	3
Reasons for Granting the Writ .....	6
Whether state tax statutes distinguishing between different segments of the communications media must satisfy strict scrutiny analysis is an important constitutional question which has not been and needs to be settled by this Court.....	6
Conclusion .....	15
Appendix.....	App. 1

## TABLE OF AUTHORITIES

	Page
<b>CASES:</b>	
<i>Arkansas Writers' Project, Inc. v. Ragland</i> , 481 U.S. 221 (1987) .....	8, 9, 11, 13, 14
<i>Cammarano v. United States</i> , 358 U.S. 498 (1959).....	11
<i>Madden v. Kentucky</i> , 309 U.S. 83 (1940) .....	12
<i>Medlock v. Pledger</i> , 785 S.W.2d 202 (Ark. 1990).....	9
<i>Minneapolis Star &amp; Tribune v. Minnesota Commissioner of Revenue</i> , 460 U.S. 575 (1983).....	13, 14
<i>Regan v. Taxation With Representation of Washington</i> , 461 U.S. 540 (1983) .....	11
 <b>CONSTITUTIONAL PROVISIONS:</b>	
U.S. Const. Amend. I .....	3, 10, 12
U.S. Const. Amend. XIV, § 1.....	3
 <b>STATUTES:</b>	
Tenn. Code Ann. § 67-6-101.....	4
Tenn. Code Ann. § 67-6-323.....	4
Tenn. Code Ann. § 67-6-329(a)(3).....	3, 4, 5
 <b>REGULATIONS:</b>	
Tenn. Admin. Comp. 1320-5-1-.46 .....	3, 4, 13



No. \_\_\_\_\_

---

In The

# Supreme Court of the United States

October Term, 1990

---

COMMISSIONER OF REVENUE  
OF THE STATE OF TENNESSEE,

*Petitioner,*

v.

NEWSWEEK, INC.; SOUTHERN LIVING, INC.;  
and PROGRESSIVE FARMER, INC.,

*Respondents.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE SUPEME COURT OF THE STATE OF TENNESSEE

---

### OPINIONS BELOW

The opinion of the Supreme Court of Tennessee in *Newsweek, Inc. v. Kathryn Behm Celauro, Commissioner of Revenue, State of Tennessee*, filed March 5, 1990, is reported at 789 S.W.2d 247, and is reprinted as Appendix A.

The opinion of the Supreme Court of Tennessee in *Southern Living, Inc., Progressive Farmer, Inc. v. Kathryn Behm Celauro, Commissioner of Revenue, State of Tennessee*, filed March 5, 1990, is reported at 789 S.W.2d 251, and is reprinted as Appendix B.

The unpublished memorandum opinion of the Chancery Court for the State of Tennessee, 20th Judicial District, in the *Newsweek, Inc.* case was filed April 22, 1988, and is reprinted as Appendix C. The unpublished supplemental memorandum opinion of the Chancery Court in that case, filed June 1, 1988, is reprinted as Appendix D.

The unpublished memorandum opinion of the Chancery Court for the State of Tennessee, 20th Judicial District, in the *Southern Living, Inc., Progressive Farmer, Inc.* case was filed April 22, 1988, and is reprinted as Appendix E. The unpublished supplemental memorandum opinion of the Chancery Court in that case, filed June 1, 1988, is reprinted as Appendix F.

---

#### JURISDICTION

This petition seeks review of judgments of the Supreme Court of Tennessee which were entered March 5, 1990. Timely petitions for rehearing were denied by the Tennessee Supreme Court by orders entered on May 14, 1990. (Appendices G and H). This petition is filed within 90 days of those denials of rehearing, pursuant to 28 U.S.C. § 2101(c) and U.S. Supreme Court Rule 13.4.

The jurisdiction of this Court to review the judgments of the Supreme Court of Tennessee is invoked under 28 U.S.C. § 1257(a).

---

## CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THE CASE

U.S. Const. Amend. I:

Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

U.S. Const. Amend. XIV, § 1:

No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tenn. Code Ann. § 67-6-329(a):

The sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state of the following tangible personal property is specifically exempted from the tax imposed by this chapter:

• • •  
(3) Newspapers.

A regulation involved in this case, Tenn. Admin. Comp. 1320-5-1-.46, is reproduced as Appendix I, pursuant to U.S. Supreme Court Rule 14.1(f).

---

## STATEMENT OF THE CASE

Newsweek, Inc., Southern Living, Inc., and Progressive Farmer, Inc., brought suit to recover use tax, interest, and penalty paid to the Tennessee Department of Revenue. The Department had assessed use tax deficiencies on the plaintiffs' sales of magazine subscriptions to Tennessee residents.

The primary business of Newsweek, Inc., is to publish and sell *Newsweek* magazine, a weekly publication containing articles on various topics, including reports of recent news events. Southern Living, Inc.'s, primary business is also to publish and sell magazines, including *Southern Living* and *Creative Ideas for Living*, monthly publications with articles relating to life in the southern region of the United States. Similarly, Progressive Farmer, Inc., publishes and sells *Progressive Farmer*, a monthly publication containing articles relating to farming, agriculture, and rural life.

The three publishers each brought suit separately, challenging the Tennessee sales and use tax system under which newspapers are exempt but the sales of the plaintiffs' publications are taxed. Tennessee's sales and use tax laws, Tenn. Code Ann. §§ 67-6-101 *et seq.*, generally tax all sales or uses of tangible personal property in the state. Tenn. Code Ann. § 67-6-329(a)(3) specifically exempts "newspapers" from the tax, but the statute does not define that term. Because no specific exemption applies to magazines (other than publications sold to or by or used by religious and charitable organizations, exempt under Tenn. Code Ann. § 67-6-323), publications other than newspapers are subject to the generally applicable sales and use tax. An administrative regulation, Tenn. Admin. Comp. 1320-5-1-.46(2), provides that a "newspaper" must possess "at least" certain enumerated characteristics. (App. I).

The publishers raised the constitutional issues in their complaints at the trial court level. Among other issues raised, the publishers alleged that the distinction drawn between newspapers and other publications for

tax exemption purposes violates the free speech and free press clauses of the First Amendment, and the due process and equal protection clauses of the Fourteenth Amendment. (*Newsweek Memo.*, App. C at 16, 21-3; *Southern Living Memo.*, App. E at 30, 35-6).

The *Southern Living* and *Progressive Farmer* cases were consolidated by the trial court, the Chancery Court for the State of Tennessee, 20th Judicial District, Davidson County. Although the *Newsweek* case was not formally consolidated with the others, the cases were tried concurrently.

Addressing the constitutional issues, the Chancery Court ruled that Tennessee's newspaper exemption, Tenn. Code Ann. § 67-6-329(a)(3), was narrowly drawn; although all newspapers are exempt, nearly all other publications are taxed. Therefore, the Chancery Court found that "[t]he State has not singled out a small group of magazines for taxation." The court found that the newspaper exemption was supported by the state interest in reducing regulation of the press. Finally, the Chancery Court ruled that the determination to exempt newspapers, but not other periodicals, from taxation offended neither the First Amendment nor the Fourteenth Amendment. (*Newsweek Memo.*, App. C. at 21-3; *Southern Living Memo.*, App. E at 35-6).

On direct appeal, the Supreme Court of Tennessee reversed. Focusing on the administrative regulation, rather than on the taxing and exemption statutes themselves, or the common understanding of the word "newspaper," the court opined that Tennessee's distinction between newspapers and other publications was content-

based. The court also ruled, contrary to the Chancery Court's findings, that the distinction "singles out the press" or "targets individual publications within the press." Then, the court applied strict scrutiny analysis. (*Newsweek* Opin., App. A at 8; *Southern Living* Opin., App. B at 14). Finding no "compelling justification" for the distinction between newspapers and other publications, the court ruled that the tax on non-newspaper publications "is invalid under the First Amendment." (*Newsweek* Opin., App. A at 8).

---

#### **REASONS FOR GRANTING THE WRIT**

**WHETHER STATE TAX STATUTES DISTINGUISHING BETWEEN DIFFERENT SEGMENTS OF THE COMMUNICATIONS MEDIA MUST SATISFY STRICT SCRUTINY ANALYSIS IS AN IMPORTANT CONSTITUTIONAL QUESTION WHICH HAS NOT BEEN AND NEEDS TO BE SETTLED BY THIS COURT.**

The Tennessee Supreme Court's decisions invalidating on First Amendment grounds the statutory distinction, for sales and use tax exemption purposes, between newspapers and other publications present constitutional issues of far-ranging national importance which have not been, but should be, decided by this Court. Many states have sales and use tax laws which distinguish between types of publications for tax exemption purposes.<sup>1</sup> Most

---

<sup>1</sup> Various types of distinctions between publications are found in the statutes or rules of approximately 35 jurisdictions, including Tennessee. See Ala. Admin. Code r.810-6-1-.110; Cal. Rev. & Tax Code § 6362(a); Colo. Rev. Stat. § 24-70-102; Conn.

(Continued on following page)

important, the Tennessee Supreme Court's misapplication of First Amendment and equal protection principles severely curtails the necessary flexibility of state legislatures to design rational systems of taxation and

---

(Continued from previous page)

Gen. Stat. § 12-412(4)(A) & (B); D.C. Code Ann. § 47-2005(6); Haw. Rev. Stat. § 14-238-1; Idaho Code §§ 63-3622I and 63-3622L; Ind. Code § 6-2.5-5-17, Ind. Admin. Code tit. 2.2-5-26, r.45; Iowa Code § 422.45(9), Iowa Admin. Code r.701-16.43; 103 Ky. Admin. Regs. 27:140; Md. Tax-Gen. Code Ann. § 11-215(c)(1)-(3), Md. Regs. Code tit. 03.06.01.05; Mich. Comp. Laws § 205.54a(h); Minn. Stat. § 297A.25 (subd. 1)(i), Minn. R. 8130.5600 (subp. 2); Miss Code Ann. § 27-65-111(b); Mo. Rev. Stat. § 144.030(7), Mo. Code Regs. tit. 12, §§ 10-3.112 and 10-3.114(1); Neb. Rev. Stat. § 77-2704(1)(d) & (n); Nev. Rev. Stat. § 372.315, Nev. Admin. Code, ch. 372, § 620; N.M. Stat. Ann. § 7-9-63; N.C. Gen. Stat. § 105-164.13(28); N.D. Cent. Code § 57-40.2-01(8)(c); Ohio Rev. Code Ann. § 5739.02(B)(4); Okla. Stat. tit. 68, § 1357(c); 1971 Pa. Laws 2, § 204(30); R.I. Gen. Laws § 44-18-30(B); S.C. Code Ann. § 12-35-550(7), S.C. Code Regs. 117-174.166; S.D. Admin. R. 64:06:03:33; Tex. Rev. Civ. Stat. Ann. §§ 151.319(a) and 151.320(a); Utah Code Ann. § 59-12-104(19), Utah Admin. R. 865-65S; Vt. Stat. Ann. tit. 32, § 9741(15); Va. Code Ann. § 58.1-608(6)(c); Wash. Rev. Code § 82.08.0253, Wash. Admin. Code §§ 458-20-127(1) & (2) and 458-20-143; W.Va. Code § 11-15-9(m); Wis. Stat. § 77.54(15); Wyo. Stat. § 39-6-405(a)(xxi), Wyo. Sales Tax Rules, § 39.

Florida's distinction between newspapers and magazines (Fla. Stat. §§ 212.05(e)(3)(i) and 212.08(7)(w); Fla. Admin. Code r.12A-1.008) was recently invalidated by the Florida Supreme Court in an opinion relying in part on the Tennessee decisions challenged here. *Dept. of Revenue v. Magazine Publishers of America, Inc.*, No. 75,201, 1990 WestLaw 74586 (Fla., May 31, 1990).

exemption,<sup>2</sup> and to create reasonable classifications in other areas of the law. This Court should take this opportunity to clarify the equal protection analysis required when state laws draw distinctions between different segments of the press.

In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), this Court expressly declined to decide the issue presented by these cases: whether state sales and use tax laws can constitutionally distinguish between different types of periodicals, such as between newspapers and magazines. 481 U.S. at 233. In *Arkansas Writers' Project*, this Court's holding that content-based distinctions between magazines were constitutionally impermissible was sufficient to invalidate the tax assessed upon the plaintiff-publisher. Thus, this Court was not required to reach, and the Court left open, the

---

<sup>2</sup> If left standing, the decisions here would cause Tennessee state and local governments significant losses of critically needed revenues. Presumably, comparable or greater revenue losses would be suffered by many other states across the nation. Nearly \$6 million in refunds are sought by the taxpayers in the present cases, and in companion cases held in abeyance by the trial court pending these cases. The Tennessee Department of Revenue conservatively estimates that Tennessee would derive at least \$2.7 million per year in state and local revenue from taxation of magazine subscriptions. These estimates do not include the untold millions of dollars in revenue from over-the-counter sales of magazines, because such sales are not reported separately but are included in the gross sales returns of newsstands, drug stores, supermarkets, and other retail outlets, and thus are very difficult to quantify. The Tennessee Supreme Court's decisions would invalidate the sales tax on over-the-counter sales, as well as the use tax on subscription sales.

question whether state tax laws could distinguish between different types of periodicals. *Id.* See also *Medlock v. Pledger*, 785 S.W.2d 202, 204 (Ark. 1990), petitions for cert. filed July 2, 1990 (Nos. 90-29 and 90-38), in which the court noted the reservation in *Arkansas Writers' Project*, and expressed unwillingness to hold "that all mass communications media must be taxed in the same way." The question reserved in *Arkansas Writers' Project* is squarely raised by the present cases, which offer the opportunity to determine the scope of the government's ability to distinguish between the various types of businesses which compose the communications media.

The Tennessee Supreme Court's opinions in the present cases hold that any and all distinctions drawn by a state legislature, for tax purposes, between different segments of the press are unconstitutional unless supported by some "compelling governmental interest." Of course, such "strict scrutiny" imposes a very heavy burden upon challenged statutes. Of much wider significance, the court's broadly written opinions may be understood as holding that if any form of expression embraced by the First Amendment is exempt from taxation, or receives some other benefit from the state, then all forms of protected expression must be allowed the same tax exemption or other benefits. In essence, the Tennessee Supreme Court's decisions not only would require absolutely uniform treatment of newspapers and magazines, but also suggest that forms of expression as varied as books, sound recordings, video tapes, motion pictures, advertising materials, and other forms of communication should be treated exactly the same as newspapers.

The state court decisions in these cases seriously erode the base of sales and use tax systems, and deprive state and local governments of desperately needed revenues. Further, the Tennessee Supreme Court's opinions contradict the widely held and logical view that newspapers have historically served, and continue to serve, some important public purpose separate and different from the functions of magazines and other forms of expression. Much more, the Tennessee Court's decisions here ignore the practical reality that the press comprises different types of business operations, which may be rationally divided into classifications, and that such classifications are not per se based on content or viewpoint. Indeed, in the court below, the Commissioner argued that Tennessee's statutory distinction between newspapers and magazines can and should be construed as content-neutral. A distinction between newspapers and magazines based upon the differing production, marketing, and distribution operations of the respective publishing businesses, and upon the physical character, format, and "shelf-life" of their products, would not refer to the content, much less the viewpoint, of the publications themselves.

Surely, state legislatures must and do have sufficient flexibility, within our constitutional framework, to design rational systems of taxation and to create reasonable classifications of taxable and nontaxable subjects, even among those business enterprises which operate within the sphere of the First Amendment. So long as such legislative classifications are not defined in terms of the content of forms of expression, and so long as protected expression is not coerced, censored, or unfairly burdened,

rational distinctions may be drawn between various forms of expression without offending the First Amendment or equal protection principles. *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 548 (1983).

In *Taxation With Representation*, a lobbying group raised First Amendment and equal protection challenges against Internal Revenue Code provisions which denied the plaintiff the ability to receive tax-deductible contributions for its lobbying activities, even though other lobbying organizations were allowed tax-deductible contributions. *Id.*, 461 U.S. at 542-3. This Court recognized that tax exemptions and tax deductibility are forms of subsidies administered through the tax system. *Id.*, 461 U.S. at 544. This Court, however, again squarely rejected the notion that First Amendment rights are impaired if not subsidized by the government. *Id.*, 461 U.S. at 546, citing *Cammarano v. United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring). A legislature's decision not to subsidize the exercise of First Amendment rights does not infringe those rights. *Taxation With Representation*, 461 U.S. at 549. See also *Arkansas Writers' Project*, 481 U.S. at 236 (Scalia, J., dissenting).

Also, in *Taxation With Representation*, this Court recognized that distinctions in tax statutes are to be evaluated according to the "rational basis" standard of equal protection analysis, even in cases involving First Amendment interests, unless the statutes suppress expression or employ suspect classifications such as race or national origin. *Id.*, 461 U.S. at 548. The Court noted its long line of decisions holding that legislatures have "especially broad latitude in creating classifications and distinctions in tax

statutes." *Id.*, 461 U.S. at 547. Further, this Court reiterated that

the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.

*Id.*, 461 U.S. at 547-8, quoting *Madden v. Kentucky*, 309 U.S. 83, 87-8 (1940).

Thus, this Court has clearly rejected the argument that strict scrutiny (i.e., the "compelling governmental interest" test) applies whenever the government subsidizes some speech but not all speech. *Taxation With Representation*, 461 U.S. at 548. Strict scrutiny applies to a statute challenged on First Amendment grounds only if the statute "was intended to suppress any ideas or . . . had that effect," or if the statute discriminates on the basis of a suspect classification such as race or national origin. *Id.*

Notwithstanding the clear directives of this Court's *Taxation With Representation* holding regarding the levels of scrutiny applicable to statutes challenged on First Amendment grounds, the Tennessee Supreme Court said that the *Taxation With Representation* case "has little or nothing to do with the abridgment of freedom of speech, or of the press contained in the First Amendment to the Constitution." (*Southern Living*, Opin., App. B at 12). The Tennessee Supreme Court thus completely and erroneously denied the applicability of the *Taxation With Representation* decision to the present cases. By so doing, the

state court placed itself in direct conflict with the unanimous decision of this Court in *Taxation With Representation*.

In the present cases, the parties stipulated that *Newsweek* magazine satisfied all of the criteria, set forth in Tenn. Admin. Comp. 1320-5-1-.46(2), describing tax-exempt newspapers, satisfying even those criteria described by the court below as "content-based." Therefore, the trait which distinguishes the magazines in these cases from tax-exempt newspapers is not the allegedly content-based element of the regulation, but rather the fact that the magazines do not fit the natural, common, and traditional sense of the word "newspaper." (See *Newsweek Memo.*, App. C at 21). Clearly, the failure of magazines to fall within the natural, plain and ordinary understanding of the word "newspaper" is not necessarily based upon the content of the different types of publications.

Further, there was no evidence in these cases that Tennessee's sales and use tax laws had the effect of coercing, censoring, or suppressing any expression of ideas. Nor was there any evidence that the challenged tax system "singles out" the press for unique tax treatment, or targets individual publications within the press for special tax burdens, factors which triggered strict scrutiny in *Arkansas Writers' Project* and in *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983).

In *Minneapolis Star*, the challenged tax was not, as it is here, a generally applicable sales and use tax, but rather a special tax aimed exclusively at paper and ink

products consumed in producing publications. *Minneapolis Star*, 460 U.S. at 577, 581. Even worse, the tax applied to only 14 out of a total of 388 newspapers in Minnesota. *Id.*, 460 U.S. at 578. In *Arkansas Writers' Project*, the practical effect of the Arkansas tax scheme was that at most only three publications were subject to tax, while all others were exempt. *Arkansas Writers' Project*, 481 U.S. at 229, n.4. Thus, strict scrutiny was appropriate in those cases.

Tennessee's sales and use tax, however, applies generally to all retail sales and uses of tangible personal property, with limited exemptions. Tennessee's tax does not single out the press, or target a limited number of publishers, but generally treats the publishing industry the same as other businesses. Nonetheless, the Tennessee Supreme Court hastened to the conclusion that strict scrutiny was the appropriate level of analysis whenever a state law distinguishes between the different segments of the press.

By so misconstruing the holdings of *Arkansas Writers' Project* and *Minneapolis Star*, and by categorically denying the applicability of this Court's reasoning in *Taxation With Representation*, the Tennessee Supreme Court's decisions would unduly expose state laws to probable invalidation under the burdensome strict scrutiny standard. State tax laws and other laws which create classifications among the different businesses within the press would be invalidated, even where the classifications are not necessarily based on content and do not suppress, coerce, censor, or impair freedom of expression.

In effect, the Tennessee Supreme Court has fashioned a rule whereby any state law distinctions between taxpayers involved in the communications media are per se subject to strict scrutiny. The analysis employed by the Tennessee court contradicts the reasoning of this Court in pertinent cases. The conclusion reached by the Tennessee court goes far beyond the prior decisions of this Court, and into an area expressly left unsettled by this Court. The proper application of equal protection principles to the competing interests of the states in creating rational systems of taxation and of taxpayers demanding subsidization for First Amendment activities is an issue of national importance which should be settled by this Court.

---

### CONCLUSION

For the reasons set forth above, the petitioner respectfully submits that this petition should be granted, and a writ of certiorari issue to review the decisions of the Supreme Court of Tennessee.

Respectfully submitted,

CHARLES W. BURSON  
Tennessee Attorney General  
Counsel of Record

JOHN KNOX WALKUP  
Solicitor General

DARYL J. BRAND  
Assistant Attorney General  
450 James Robertson Parkway  
Nashville, Tennessee 37243-0485  
(615) 741-2041

*Counsel for Petitioner*



## TABLE OF CONTENTS OF APPENDIX

- A - Opinion of Supreme Court of Tennessee in *Newsweek, Inc.*, filed March 5, 1990..... App. 1
- B - Opinion of Supreme Court of Tennessee in *Southern Living, Inc., Progressive Farmer, Inc.*, filed March 5, 1990.....App. 10
- C - Memorandum of the Chancery Court in *Newsweek, Inc.*, filed April 22, 1988..... App. 16
- D - Supplemental Memorandum of the Chancery Court in *Newsweek, Inc.*, filed June 1, 1988..... App. 26
- E - Memorandum of the Chancery Court in *Southern Living, Inc., and Progressive Farmer, Inc.*, filed April 22, 1988.....App. 29
- F - Supplemental Memorandum of the Chancery Court in *Southern Living, Inc. and Progressive Farmer, Inc.*, filed June 1, 1988.....App. 39
- G - Order of Supreme Court of Tennessee denying rehearing in *Newsweek, Inc.*, filed May 14, 1990..... App. 43
- H - Order of Supreme Court of Tennessee denying rehearing in *Southern Living, Inc., Progressive Farmer, Inc.*, filed May 14, 1990.....App. 44
- I - Tenn. Admin. Comp. 1320-5-1-.46..... App. 45



APPENDIX A  
IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

NEWSWEEK, INC.	) FOR
Plaintiff/Appellant,	) PUBLICATION
v.	)
KATHRYN BEHM CELAURO, COMMISSIONER OF REVENUE, STATE OF TENNESSEE,	) March 5, 1990
Defendant/Appellee.	) DAVIDSON
	) CHANCERY
	) Hon. Irvin H.
	) Kilcrease,
	) Jr., Chancellor
	)
	) S/C No. 88-54-I

FOR APPELLANT:

Charles A. Trost  
WALLER, LANSDEN,  
DORTCH & DAVIS  
Nashville, Tennessee

FOR APPELLEE:

Charles W. Burson  
Attorney General  
& Reporter

Daryl J. Brand  
Assistant Attorney General  
Nashville, Tennessee

OPINION

REVERSED & REMANDED

O'BRIEN, J.

This suit was instituted for the recovery of sales taxes, penalty and interest paid by the plaintiff under protest. The defendant Commissioner of Revenue assessed a sales and/or use tax on plaintiff's mail order subscription sales during the period 1 January 1982 through 31 December 1984, pursuant to the Retailers' Sales Tax Act, T.C.A. §67-6-201, et seq.

## App. 2

The issues presented for review here are substantially those found by the trial court and ruled upon adversely to the plaintiff. Those issues are:

(1) Is the plaintiff's publication, Newsweek, a "newspaper" within the meaning of the word used in T.C.A. §67-6-329(3) and defined in Department of Revenue Regulation Sec. 1320-5-1-46, and thus exempt from imposition of a sales tax.

(2) If Newsweek is "not a newspaper" does the imposition of a tax on sales of Newsweek as a magazine, denying it the newspaper exemption from the same tax, amount to a violation of plaintiff's constitutional rights in that:

A. It violates plaintiff's constitutional guarantees of freedom of the press and freedom of expression under the First and Fourteenth Amendments to the United States Constitution and Article I, Sec. 19 of the Tennessee Constitution;

B. It denies plaintiff's right to due process of law and equal protection under the guarantees of the Fourteenth Amendment to the United States Constitution and Article I, Sec. 8 of the Tennessee Constitution.

(3) Does or not the plaintiff have sufficient nexus with the State of Tennessee to give the State a constitutionally valid jurisdictional basis to impose a sales tax on plaintiff's subscription sales of the Newsweek publication to residents of Tennessee.

(4) Is the imposition of a penalty against the plaintiff under the Tennessee tax law and regulations equitable and should the penalty be abated.

We look initially to the constitutional claims charging violation of plaintiff's first amendment guarantees of freedom of the press and freedom of expression. These claims are dispositive if found against the State.

The trial court held that plaintiff's reliance on the United States Supreme Court decision in *Arkansas Writers' Project, Inc. v. Ragland*, \_\_\_ U.S. \_\_\_, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987) was misplaced. He found that the Arkansas sales tax on tangible personal property, including publications, contained broad exemptions for newspapers and religious, professional, trade and sports journals, and/or publications printed and published in Arkansas. The effect of the exemptions was to single out a small group of magazines for taxation. It was the chancellor's view that the United States Supreme Court held the State's selective application of its sales tax to magazines to be violative of the First Amendment because the State failed to show that its content-based discrimination was necessary to serve a compelling State interest. The Court did not address whether the differential treatment of magazines and newspapers would invalidate the State tax. He held that the Tennessee Sales Tax Exemption was more narrowly drawn than in *Ragland*. Although all newspapers are exempt, no magazines are exempt except certain religious publications, pursuant to T.C.A. §67-6-323. He found the State had not singled out a small group of magazines for taxation. The compelling State interest advanced by defendant was to reduce regulations and further freedom of the press, which was a sufficiently compelling State interest to warrant exempting newspapers. He held that the decision to not exempt other periodicals from taxation was not a violation of freedom

## App. 4

of the press or freedom of expression under the First Amendment. We disagree with the trial court's conclusion.

We begin this analysis with the proposition that the First Amendment does not prohibit all regulation of the press. The state and the federal governments may subject newspapers to generally applicable economic regulation, i.e., some form of taxation, without creating constitutional problems. See *Minneapolis Star & Tribune v. Minn., Com'r of Rev.*, 460 U.S. 575, 103 S.Ct. 1365, 1369, 75 L.Ed.2d 295 (1983). However, a tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest, *id.* 103 S.Ct. at 1370. In the *Minneapolis Star* case the Court found that the State had not chosen to apply its general sales and use tax to newspapers generally but instead had created a special tax that applied only to certain publications protected by the First Amendment.

The State concedes that constitutional problems arise with respect to taxation of the press when a State's system of taxation singles out the press for special treatment and poses burdens on the press not applicable to other businesses. They argue that differential treatment of the press, as opposed to other businesses, does not occur under Tennessee Sales & Use Tax Statutes. They note that the plaintiff's grievance in this case is not that the press is singled out for special, burdensome tax treatment, but rather that some portion of the press, specifically newspapers, is afforded a tax exemption while elements of the press, including the plaintiff, are subject to the generally applicable sales and use tax. They assert that generally,

## App. 5

statutory classifications and distinctions are valid if they are rationally related to legitimate governmental purposes.

It is the State's position that Tennessee's exemption of newspapers, while other types of publications are taxed, can be justified as a content-neutral distinction. They begin with the premise that the term "newspaper" can be defined as a function of the methods of a publishing business operation, rather than in terms of the subject matter or viewpoint of a given publication. They then syllogize that if a publication is defined in terms which are not based on content, tax officials need look only to the method of the publisher's business operation to determine whether its publications deliver news and information in a timely and immediate manner. Therefore in order to qualify as a newspaper and thus avoid First Amendment problems, under the principles requiring that statutes be construed so as to uphold their constitutionally, that definition of "newspaper" should be favored and applied to the language of T.C.A. §67-6-329(a)(3). That other types of publications, while serving a useful public interest in disseminating information, may be rationally viewed by a legislature as not providing the immediacy which is needed by the public. Thus a legislature can rationally classify newspapers as nontaxable, and levying the tax on other publications does not interfere with or burden the freedom of the press.

This analysis does not pass muster in light of the requirement that in order to qualify for the newspaper exemption in Tennessee, among other things, a publication "must contain matters of general interest and reports

## App. 6

of current events." Rule 46(2)(d). This is not a content-neutral requirement. As *Arkansas Writer's*, *supra*, emphasizes, the First Amendment prohibits not only restrictions on particular viewpoints, it extends to prohibition of public discussion in its entirety. 107 S.Ct. at 1726.

In the *Arkansas* case the publisher of a general interest magazine brought suit challenging Arkansas's Sales Tax scheme. Arkansas, as does Tennessee, imposes a tax on receipts from sales of tangible personal property, but exempts numerous items, including newspapers and religious, professional, trade, and sports journals and/or publications printed and published within the State, familiarly known as the "magazine exemption." The Arkansas Supreme Court held that the magazine exemption applied only to religious, professional, trade, or sports periodicals. The United States Supreme Court at 107 S.Ct. 1726-27, citing *Minneapolis Star*, *supra* at 103 S.Ct. 1371, and *Grosjean v. American Press Company*, 297 U.S. at 2244-245, 56 S.Ct. at 446-447, stated, "our cases clearly establish that a discrimination tax on the press burdens rights protected by the First Amendment. In *Minneapolis Star* the discrimination took two distinct forms. First, in contrast to generally applicable economic regulations to which the press can legitimately be subject, the Minnesota use tax treated the press differently from other enterprises. . . . Second, the tax targeted a small group of newspapers. . . . Both types of discrimination can be established even where, as here, there is no evidence of an improper censorial motive. . . . This is because selective taxation of the press – either singling out the press as a whole or targeting individual members of the press – poses a particular danger of abuse by the

## App. 7

State. 'A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of tax payers by burdensome taxation if it must impose the same burden on the rest of its constituency.' "

Noting that a tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action, the Court held that Arkansas had advanced no compelling justification for selective, content-based taxation of certain magazines. They held the tax invalid under the First Amendment.

The State here argues that the newspaper exemption of T.C.A. §67-6-329(a)(3) furthers a vital public purpose and compelling public interest by providing immediate and timely dissemination of information to the public. At the same time it is argued that computer networks, radio, television and other electronic media help fill this need, but are not normally subject to sales and use tax because their transmissions of information often do not involve transfers of tangible personal property.

In our view, the immediate provision of news is not a compelling governmental interest. There is nothing to suggest that newspapers require an exemption in order to furnish such immediacy in bringing the news to the public. Further, there is no basis for giving immediate news a privileged position over other avenues of news reporting which is accompanied by more deliberative analysis or

commentary. It is not a legitimate function of the government to decide which information furthers better the public interest. Moreover, the exemption statute is not narrowly tailored to meet the asserted governmental interest. Newsweek publishes as frequently as many exempt newspapers. With the application of current day technology, its "news" is no more stale than that of newspapers publishing weekly.

The trial court found that the purpose in exempting newspapers from taxation was to further freedom of the press and to reduce regulation in the area of the press and held that to be a sufficiently compelling State interest to warrant the exemption. The State does not defend those issues here but relies on its argument that the Tennessee Sale & Use Tax system withstands constitutional challenge because it is rationally related to the promotion of vital and compelling public interest and Tennessee's distinction between newspapers and other publications is not based upon content, but can be defined and justified as content-neutral.

The tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action. *Minneapolis Star*, supra, 1376. In this case the State has failed to meet this heavy burden. It has advanced no compelling justification for selective, content-based taxation of plaintiff's publication. We hold therefore the tax is invalid under the First Amendment.

The chancellor also ruled on the issue of whether a tax on plaintiff's non-religious publications while exempting certain religious publications from taxation is

App. 9

an unconstitutional establishment of religion. That issue is neither presented nor argued here and thus we consider it pretermitted, as well as other issues have been pretermitted by our finding that the Tennessee tax scheme is invalid as it applies to this plaintiff. Nonetheless we believe the issue has been settled by the United States Supreme Court opinion in *Texas Monthly, Inc. v. Bullock*, \_\_\_ U.S. \_\_\_, 109 S.Ct. 890, \_\_\_ L.Ed.2d \_\_\_ (1989).

The judgment of the trial court is reversed. The case is remanded for such other and further proceedings as may be required. The costs on this appeal are assessed against the defendant.

/s/ Charles H. O'Brien,  
CHARLES H. O'BRIEN,  
JUSTICE

Drowota, C.J.  
Fones & Harbison, JJ.  
Cornelius, S.J.

---

**APPENDIX B**  
**IN THE SUPREME COURT OF TENNESSEE**  
**AT NASHVILLE**

SOUTHERN LIVING, INC.,	) FOR PUBLICATION
PROGRESSIVE FARMER,	)
INC.,	) March 5, 1990
Plaintiffs/Appellants,	) DAVIDSON CHANCERY
v.	) Hon. Irvin H. Kilcrease, Jr.,
KATHRYN BEHM	) Chancellor
CELAURO,	)
COMMISSIONER OF	)
REVENUE, STATE	)
OF TENNESSEE,	)
Defendant/Appellee.	)

**FOR APPELLANTS:**

Charles A. Trost  
WALLER, LANSDEN,  
DORTCH & DAVIS  
Nashville, Tennessee

**FOR APPELLEES:**

Charles W. Burson  
Attorney General & Reporter  
Daryl J. Brand  
Assistant Attorney General  
Nashville, Tennessee

**OPINION**

**REVERSED & REMANDED**

**O'BRIEN, J.**

This suit was instituted for the recovery of sales taxes, penalty and interest paid by the plaintiffs under protest. It involves substantially the same facts and circumstances contained in *Newsweek, Inc. v. Commissioner of Revenue*, which is released contemporaneously with this cause of action. The Commissioner assessed a sales and/or use tax on plaintiffs' mail order subscription sales in

the State of Tennessee for the years 1985 through September 1987, pursuant to the Retailers Sales Tax Act, T.C.A. § 67-6-201, *et seq.*

The issues presented for review are summarized as follows:

- (1) Did the plaintiffs have a sufficient nexus with the State of Tennessee to warrant imposition of a sales tax on mail order subscription sales of their publications, Southern Living, Creative Ideas for Living and Progressive Farmer to residents of Tennessee?
- (2) If the foregoing publications are not "newspapers" does the imposition of a tax on the sales of these publications as magazines, periodicals or publications, denying it the newspaper exemption from the same tax, amount to a violation of plaintiffs' constitutional rights in that:
  - (a) It violates plaintiffs' constitutional guarantees of freedom of the press and freedom of expression under the First and Fourteenth Amendments to the United States Constitution and Article I, Sec. 19 of the Tennessee Constitution;
  - (b) It denies plaintiffs' right to due process of law and equal protection under the guarantees of the Fourteenth Amendment to the United States Constitution and Article I, Sec. 8 of the Tennessee Constitution.
- (3) Is the imposition of the sales tax on sales of plaintiffs' non-religious publications, while allowing an exemption from taxation on the sale, use or distribution of religious publications to or by churches or charitable institutions, not an unconstitutional establishment of religion and religious discrimination in violation of the First and Fourteenth Amendments to the United

## App. 12

States Constitution and Article I, Sec. 3 and Article XI, Sec. 8 of the Tennessee Constitution?

(4) Is the imposition of a penalty against the plaintiffs under the Tennessee tax law and regulations equitable and should the penalty be abated?

We are of the opinion that the Tennessee tax scheme is invalid as it affects the plaintiffs and is in violation of their rights to freedom of speech and press under the First Amendment to the United States Constitution and Article I, Sec. 19 of the Tennessee Constitution.

In addressing plaintiffs' First Amendment claim of infringement on the constitutional guarantee of freedom of speech and the press the State relies almost wholly on the United States Supreme Court decision in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983). This case was a suit brought by the Taxation With Representation organization in federal court seeking a declaratory judgment that it qualified for exemption granted by the Internal Revenue Department to certain charitable and religious organizations under the Internal Revenue Code. That case has little or nothing to do with the abridgement of freedom of speech, or of the press contained in the First Amendment to the Constitution, which is the thrust of the complaint in this suit. It is indisputable that a tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest. *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 103 S.Ct. 1365, 1370, 75 L.Ed.2d 295 (1983).

In response to that verity, the State says that differential treatment of the press, as opposed to other businesses, does not occur under Tennessee Sales and Use Tax statutes. The Tennessee and Use Tax applies generally to everyone engaged in the business of selling tangible personal property at retail in Tennessee, or who uses or consumes such property in the State, citing T.C.A. § 67-6-201. They state correctly that plaintiffs' grievance is that newspapers in this State are afforded a tax exemption while other elements of the press, including the plaintiffs' publications, are subject to the generally applicable sales and use tax. In support of its contention the State says that Tennessee's exemption of newspapers, while other types of publications are taxed, can be justified as a content-neutral distinction, citing as authority a California Court of Appeals libel suit in which the court engaged in a semantical discussion of the definition of a newspaper in contemplation of California's libel and slander statutes. Utilizing this classification the State insists that the "newspaper" exemption of T.C.A. § 67-6-329(a)(3) is revealed as furthering a vital public interest: "The immediate and timely dissemination of information to the public."

We responded fully to this assertion in the *Newsweek* case, and concluded that in our view, the immediate provision of news is not a compelling governmental interest. There is nothing to suggest that newspapers require an exemption in order to furnish such immediacy in bringing the news to the public. Further, there is no basis for giving immediate news a privileged position over other avenues of news reporting which is accompanied by more deliberative analysis or commentary. It is not a

legitimate function of the government to decide which form of information furthers better the public interest. Moreover, the exemption statute is not narrowly tailored to meet the asserted governmental interest. The tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action. *Minneapolis Star*, supra, 1376. In this case the State has failed to meet this heavy burden. It has advanced no compelling justification for selective, content-based taxation of plaintiffs' publications.

We have not addressed the constitutional issues under the free-press provisions of the Tennessee Constitution because we have previously expressed the opinion that the Tennessee Constitutional provision assuring protection of speech and press, Tennessee Constitution Article I, Sec. 19, should be construed to have a scope at least as broad as that afforded those freedoms by the First Amendment of the United States Constitution. *Leech v. American Book Sellers Ass'n, Inc.*, 582 S.W.2d 738, 745 (Tenn.1979).

The appellants present the issue here, ruled upon adversely to them in the trial court, of whether a tax on their non-religious publications while exempting certain religious publications from taxation is an unconstitutional establishment of religion. We consider that issue pretermitted, as well as other issues have been pretermitted, by our finding that the Tennessee tax scheme is invalid as it applies to these plaintiffs. Nonetheless, we subscribe to the view stated by the United States Supreme Court in *Texas Monthly, Inc. v. Bullock*, \_\_\_ U.S. \_\_\_, 109 S.Ct. 890, \_\_\_ L.Ed.2d \_\_\_ (1989), at p. 896, "It is not for us to decide whether the correct response as a matter of

State law to a finding that a state tax exemption is unconstitutional is to eliminate the exemption, to curtail it, to broaden it, or to invalidate the tax altogether." That is a legislative function.

The judgment of the trial court is reversed. The case is remanded for such other and further proceedings as may be required. The costs on this appeal are assessed against the defendant.

/s/ Charles H. O'Brien  
CHARLES H. O'BRIEN,  
JUSTICE

CONCUR:

Drowota, C.J.  
Fones, Cooper & Harbison, JJ.

---

APPENDIX C

NEWSWEEK, INC. ) IN THE CHANCERY  
VS. NO. 86-1250-II(I) ) COURT FOR THE STATE  
KATHRYN BEHM ) OF TENNESSEE 20TH  
CELAURO ) JUDICIAL DISTRICT  
 ) DAVIDSON COUNTY,  
 ) PART ONE  
 ) FILED APR 22 1988

MEMORANDUM

This case was brought for the recovery of sales taxes, penalty and interest paid by the plaintiff under protest. Defendant Commissioner of Revenue has assessed a sales and/or use tax on plaintiff's mail-order subscription sales in Tennessee pursuant to the Retailers' Sales Tax Act, T.C.A. § 67-6-201, *et seq.*, for the years 1985 through the present.

The plaintiffs raise the following five issues:<sup>\*</sup> 1) whether plaintiffs have a sufficient nexus with Tennessee to give the State a constitutional basis upon which to impose the sales tax; 2) whether plaintiff's publications qualify for the newspaper exemption provided by T.C.A. § 67-6-329(3); 3) if plaintiff's publications are not exempt as newspapers, whether a tax on plaintiff's publications violates plaintiff's constitutional rights under the United States' and Tennessee Constitutions; 4) whether the taxation of non-religious publications such as plaintiff's,

---

\*Two additional issues concerning application of the local option sales tax and refund of penalty were raised by plaintiff in its complaint. Since these issues were not presented in plaintiff's brief, the Court will consider them waived.

## App. 17

while exempting certain religious publications from taxation, violates the United States' and Tennessee Constitutions; and 5) whether plaintiff's publications are exempt from tax after March 20, 1987, pursuant to T.C.A. § 67-6-329(a)(23).

### Findings of Fact

The facts of this case were stipulated by the parties. The Court adopts all of the facts which are set forth in stipulation; however, for purposes of brevity all of the facts will not be recited here.

Plaintiff *Newsweek*, Inc. is a New York corporation with its principal place of business in New York City. It publishes *Newsweek*, a news periodical distributed weekly. The State assessed tax deficiencies for sales taxes alleged to be due for mail-order subscription sales of plaintiff's publication to Tennessee residents.

Plaintiff has no office in Tennessee. From 1982 to mid-1984, *Newsweek* was printed in Nashville under a contract with an unrelated printing plant for mailing to subscribers in and out of Tennessee using mailing labels supplied by plaintiff. Since mid-1984, *Newsweek* has been printed outside of Tennessee. Manuscripts are prepared in New York and sent to New Jersey for assembly and then sent via satellite to the printer. During the period *Newsweek* was printed in Nashville, plaintiff had two employees on-site at the printing plant to oversee processing and distribution.

Plaintiff employs no sales force in Tennessee to sell subscriptions. Plaintiff's advertising sales force is based

in Atlanta and visits Tennessee to sell advertisements periodically, fewer than ten days a year. Any advertising orders are accepted and processed in New York.

As part of its news gathering, plaintiff sends reporters into Tennessee as needed and occasionally uses local "stringers" to send background material for articles appearing in *Newsweek*.

Subscriptions to *Newsweek* are sold in Tennessee by two methods. First, plaintiff receives direct subscriptions from customers in response to solicitations mailed into Tennessee from outside the state or in response to order forms in plaintiff's publications. Second, plaintiff receives subscriptions as a result of sales in Tennessee by third-party marketing companies, such as QSP, Inc. QSP, Inc. markets many periodicals by contract with schools and other organizations. Defendant is not claiming that plaintiff owes sales tax on subscriptions sold through third-party vendors, only on the direct mail-order subscriptions.

#### Conclusions of Law

- I. Whether plaintiff has a sufficient nexus with Tennessee to give the defendant a constitutional basis upon which to impose a sales tax on the plaintiff.

The decisions of the United States Supreme Court on this issue are based largely on the facts of each case. This Court must find a nexus or relationship between the activity sought to be taxed, here, mail-order subscription sales, and the plaintiff's activity within Tennessee. *National Geographic Society v. Cal. Bd. of Equalization*, 430

U.S. 551 (1977). For Tennessee to impose a sales tax in the absence of such a nexus would be a violation of the commerce clause, Article I, Section 8 of the United States Constitution and the due process clause of the Fourteenth Amendment of the United States Constitution.

*Newsweek* was printed in Tennessee from 1982 to mid-1984, subscriptions are solicited in the state by independent marketing companies and by solicitations mailed into the state by plaintiff, plaintiff's advertising sales people enter the state periodically to solicit advertising, plaintiff sends reporters into the state to gather news and occasionally employs the services of local news reporters. The Court concludes that all of these activities when taken together constitute a sufficient nexus with Tennessee to give the defendant a constitutional basis upon which to impose a sales tax on plaintiff's mail-order subscription sales.

II. Whether plaintiff's publications qualify for the newspaper exemption provided by T.C.A. § 67-6-329(3).

Plaintiff forcefully asserts that they qualify for the newspaper exemption, T.C.A. § 67-6-329(3). There is a strong presumption against exemptions and in a suit by a taxpayer claiming exemption from taxation, the burden is on the taxpayer to clearly establish the right to the exemption. Any well-founded doubt is fatal to the taxpayer's claim. *Woods v. General Oils, Inc.*, 558 S.W.2d 433 (Tenn. 1977). Plaintiff's exemption claim is primarily based on their argument that their publications satisfy the definition of "newspaper" set forth in State Sales and

## App. 20

Use Tax Regulation 1320-5-1-.46 (Rule 46). Rule 46 provides as follows:

*Publishers of newspapers, magazines, periodicals, etc. —*

(1) Sales of newspapers, whether by publishers or others, are specifically exempt from the Sales or Use Tax. Sales of papers and ink used for manufacturing these papers are sales for further processing and are also exempt from the tax.

(2) In order to constitute a newspaper, the publication must contain at least the following elements:

(a) It must be published at stated short intervals, (usually daily or weekly).

(b) It must not, when its successive issues are put together, constitute a book.

(c) It must be intended for circulation among the general public.

(d) It must contain matters of general interest or reports of current events.

(3) Notwithstanding the fact that the publication may be devoted primarily to matters of specialized interests, such as legal, mercantile, political, religious or sporting, if in addition to the special interests it serves, the alleged newspapers contain general news of the day, information of current events, and news of importance and of current interest to the general public, it is entitled to be classed as a newspaper.

(4) Sales of magazines, periodicals, and all publications other than newspapers, whether made "over the counter," or by subscription, are subject to the Sales or Use Tax.

(5) When subscriptions are placed or accepted for magazines or any other publication published in a series or serial manner, which are subject to the Sales or Use Tax, the Sales or Use Tax shall accrue and be assessed at the time of the acceptance of the subscription.

The parties have stipulated that *Newsweek* meets the criteria set forth in Rule 46(2). Nevertheless, the Court agrees with the defendant that in order to qualify for the newspaper exemption, a publication must be a newspaper in the common and popularly accepted usage of the term. *See Shoppers Guide Pub. Co., Inc. v. Woods*, 547 S.W.2d 561, 563 (1977). The Court finds that the legislature intended to exempt from sales tax newspapers in the natural, plain and ordinary understanding of the word newspaper and did not intend to include magazines. *See Gasson v. Gay*, 49 So. 2d 525, 526 (Fla. 1950).

After consideration of the evidence and arguments presented, the Court finds that plaintiff has failed to carry the burden of proof, as it must, that *Newsweek* is a newspaper and entitled to a sales tax exemption.

III. If plaintiff's publications are not exempt as newspapers, whether a tax on plaintiff's publications violates plaintiff's constitutional guarantees of freedom of the press and freedom of expression under the First and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the Tennessee Constitution; violates the due process clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 8 of the Tennessee Constitution; violates the equal protection guarantee of the Fourteenth Amendment to the United States Constitution and Article II, Section 8 of the Tennessee Constitution.

a. freedom of the press and freedom of expression

Plaintiff's argument rests largely on the decision of the United States Supreme Court in *Arkansas Writers' Project, Inc. v. Ragland*, 95 L. Ed. 2d 209 (1987). Arkansas's sales tax on tangible personal property including publications contained broad exemptions for newspapers and religious, professional, trade and sports journals and/or publications printed and published in Arkansas. The effect of the exemptions was to single out a small group of magazines for taxation. The United States Supreme Court held the state's selective application of its sales tax to magazines to be violative of the First Amendment because the State failed to show that its content-based discrimination was necessary to serve a compelling state interest. The Court did not address whether the differential treatment of magazines and newspapers would invalidate the state tax.

In the present case, the sales tax exemption is more narrowly drawn than in *Ragland*. Although all newspapers are exempt, no magazines are exempt except certain religious publications, pursuant to T.C.A. § 67-6-323. The State has not singled out a small group of magazines for taxation. The compelling state interest advanced by the defendant for exempting newspapers from taxation is to further freedom of the press and to reduce regulation in the area of the press. The Court finds that the state's interest in exempting newspapers from sales tax is sufficiently compelling. The defendant's decision not to exempt other periodicals from taxation is not a violation of freedom of the press or freedom of expression as

guaranteed by the constitutions of the United States and of Tennessee.

b. due process and equal protection

Discrimination as alleged by the plaintiff with respect to the taxing and nontaxing of magazines and newspapers under the taxing laws of this state does not rise to a level of discrimination which would cause the statute to be unconstitutional under the constitutions of the United States and of Tennessee.

IV. Whether a tax on plaintiff's nonreligious publications while exempting certain religious publications from taxation is an unconstitutional establishment of religion.

The sales tax exemption on certain religious publications is pursuant to T.C.A. § 67-6-323:

The taxes levied under this chapter shall not apply to the use, sale, or distribution of religious publications to or by churches or other religious or charitable institutions for use in the customary religious or charitable services.

The defendant's asserted purpose in exempting the sale of religious publications to or by churches for use in religious services is to avoid excessive entanglement in religion. Plaintiff argues that any content-based discrimination violates the First Amendment, relying on *Regan v. Time, Inc.*, 468 U.S. 461, 648-49 (1984). The defendant, relying on *Waltz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970), contends that the grant of a tax exemption is not a sponsorship or establishment of religion. The defendant is simply abstaining from demanding that the church support the state. The tax exemption

for religious publications sold by or to churches for use in religious services reinforces the desired separation between church and state. The Court finds the defendant's position persuasive and concludes that the exemption provided by T.C.A. § 67-6-323 is not an unconstitutional establishment of religion.

V. Whether plaintiff's publications are exempt from tax after March 20, 1987, pursuant to T.C.A. § 67-6-329(a)(23).

T.C.A. § 67-6-329(a)(23) exempts from sales and/or use tax:

Magazines and books which are distributed and sold to consumers by United States mail or common carrier, where the only activities of the seller or distributor in Tennessee are those activities having to do with the printing, storage, labeling and/or delivery to the United States mail or common carrier of such magazines or books, or the maintenance of raw materials with respect to such activities, notwithstanding that such seller or distributor maintains in Tennessee employees solely in connection with the production and quality control of such printing, storage, labeling and/or delivery, or in connection with news gathering and reporting.

Based on the facts of this case, the Court concludes that plaintiff is not exempt from the sales tax after March 20, 1987. Plaintiff is active within the state through independent contractor marketing companies, such as QSP, Inc., and its advertising salesmen who come to Tennessee to solicit advertising periodically.

App. 25

The case will be dismissed. The attorney for the defendant will draw an order in accordance with this memorandum taxing the costs to the plaintiff.

/s/ Irvin H. Kilcrease, Jr.  
IRVIN H. KILCREASE, JR.  
CHANCELLOR

April 22, 1988

cc: Charles A. Trost  
Daryl Brand

---

**APPENDIX D**

NEWSWEEK, INC. ) IN THE CHANCERY  
VS. NO. 86-1250-II(I) ) COURT FOR THE STATE  
KATHRYN BEHM ) OF TENNESSEE 20TH  
CELAURO ) JUDICIAL DISTRICT  
COMMISSIONER OF ) DAVIDSON COUNTY,  
REVENUE, STATE ) PART ONE  
OF TENNESSEE ) FILED JUN 1 1988  
 )

**MEMORANDUM**

This action is before the Court, pursuant to Rule 52, T.R.C.P. and upon agreement of the parties, as evidenced by the Agreed Order entered on May 23, 1988, in Minute Book 269, page 5. The Agreed Order moves the Court to reconsider and amend by striking the footnote on page one (1) of the Court's Memorandum filed April 22, 1988, which footnote states as follows:

Two additional issues concerning application of the local option sales tax and refund of penalty were raised by plaintiffs in their complaints. Since these issues were not presented in plaintiffs' briefs, the court will consider them waived.

Upon review of the record, the Court is of the opinion and finds that the footnote should be stricken, therefore, plaintiff's motion to reconsider and to amend the footnote is granted.

**Plaintiff's Claim for Refund of Penalty**

Plaintiff Newsweek, Inc. argues that it is entitled to a refund or abatement of the penalty assessed against it by the defendant Commissioner of Revenue for the State of Tennessee. The plaintiff contends that at the time the tax

liability was incurred, its liability was unclear and unsettled, that is, whether its publication fitted within the literal language of the regulations as being an exempt newspaper.

In *Benson v. United States Steel Corporation*, 465 S.W.2d 124, 130 (Tenn. 1971), the Court held that in tax penalty cases, the courts have the power to remit penalties, if the equities demand such remission. The Court listed four guidelines for determining which cases show good and reasonable cause for remission of the tax penalty. The plaintiff Newsweek, Inc. relies on the third guideline:

(3) The provisions of the pertinent law or regulations were at the time the deficiency was incurred unsettled, unclear or misleading to a reasonable person and the taxpayer acted in good faith upon a reasonable though mistaken application of such law or regulations, with the result that the tax deficiency in question was incurred.

See *Tidwell v. Goodyear Tire & Rubber Company*, 520 S.W.2d 721, 725 (Tenn. 1975); *Service Merchandise Co., Inc. v. Jackson*, 735 S.W.2d 443 (Tenn. 1987) and T.C.A. § 67-1-803(c) (1) (C).

This Court finds that plaintiff's claim that the law was unclear and unsettled as to whether its publication was an exempt newspaper and, therefore, not subject to sales tax is without merit. Plaintiff's publication is a magazine which is subject to the Sales and Use Tax. Therefore, plaintiff's request for refund or remission of the tax penalty is denied.

### Application of Local Option Sales Tax

The plaintiff contends that nexus with the State of Tennessee is insufficient for the defendant's imposition of a local option sales tax on plaintiff's publication. However, the evidence shows that *Newsweek* magazine was printed in Nashville from the year 1982 to mid-1984 and during this period *Newsweek* had two employees on-site to oversee the processing and distribution of the magazine.

Among the methods by which subscriptions of *Newsweek* are sold in Tennessee are in response to solicitations mailed into Tennessee and in response to order forms in the *Newsweek* magazine. Thus, the Court finds that *Newsweek* is engaged in the business of making sales within the State of Tennessee. Therefore, it is subject to the local option sales tax. The defendant has violated neither the federal nor state constitutions. See *Pidgeon-Thomas Iron Company v. Garner*, 495 S.W.2d 826, 830 (Tenn. 1973). See also T.C.A. § 67-6-702.

The attorney for the defendant shall prepare an order incorporating the Court's Memorandum filed on April 22, 1988 and the instant Memorandum. The costs are taxed to the plaintiff.

/s/ Irvin H. Kilcrease, Jr.  
IRVIN H. KILCREASE, JR.  
CHANCELLOR

June 1, 1988

cc: Charles A. Trost  
Daryl Brand

---

APPENDIX E

SOUTHERN LIVING, INC.	)	
VS. NO. 86-933-I	)	IN THE CHANCERY
KATHRYN BEHM	)	COURT FOR THE
CELAURO	)	STATE OF TENNESSEE
and	)	20TH JUDICIAL
PROGRESSIVE FARMER,	)	DISTRICT DAVIDSON
INC.	)	COUNTY PART ONE
VS. NO. 86-934-II(I)	)	FILED 1988 APR 22
KATHRYN BEHM	)	
CELAURO	)	

MEMORANDUM

These consolidated actions were brought for the recovery of sales taxes, penalty and interest paid by plaintiffs under protest. Defendant Commissioner of Revenue has assessed a sales and/or use tax on plaintiffs' mail-order subscription sales in Tennessee pursuant to the Retailers' Sales Tax Act, T.C.A. § 67-6-201, *et seq.* for the years 1985 through the present.

The plaintiffs raise the following five issues:<sup>\*</sup> 1) whether plaintiffs have a sufficient nexus with Tennessee to give the State a constitutional basis upon which to impose the sales tax; 2) whether plaintiffs' publications qualify for the newspaper exemption provided by T.C.A. § 67-6-329(3); 3) if plaintiffs' publications are not exempt

---

\* Two additional issues concerning application of the local option sales tax and refund of penalty were raised by plaintiffs in their complaints. Since these issues were not presented in plaintiffs' briefs, the court will consider them waived.

as newspapers, whether a tax on plaintiffs' publications violates plaintiffs' constitutional rights under the United States' and Tennessee Constitutions; 4) whether the taxation of non-religious publications such as plaintiffs', while exempting certain religious publications from taxation, violates the United States' and Tennessee Constitutions; and 5) whether plaintiffs' publications are exempt from tax after March 20, 1987, pursuant to T.C.A. § 67-6-329(a)(23).

#### Findings of Fact

The facts of this case were stipulated by the parties. The Court adopts all of the facts which are set forth in stipulation; however, for purposes of brevity all of the facts will not be recited here.

Plaintiffs Southern Living, Inc. and Progressive Farmer, Inc. are Delaware corporations with their principal places of business in Birmingham, Alabama. They publish, respectively, *Southern Living* and *Progressive Farmer*. Plaintiff Southern Living, Inc. also publishes *Creative Ideas for Living*. The State assessed tax deficiencies for sales taxes alleged to be due for mail-order subscription sales of plaintiffs' publications to Tennessee residents.

Plaintiff Southern Living, Inc. (*Southern Living*) has no office in Tennessee, and Progressive Farmer, Inc. (*Progressive Farmer*) has editorial offices in Nashville and Memphis. Plaintiffs' publications are printed in Nashville under a contract with an unrelated company. Manuscripts for publications are prepared in Alabama and mailed on film to the Tennessee printer. The Tennessee printer mails

the publications to subscribers in a number of states including Tennessee using mailing labels supplied by plaintiffs. Copies are also delivered to wholesalers by common carrier.

Plaintiffs employ no sales force in Tennessee to sell subscriptions. Plaintiffs' advertising sales force is based in Atlanta and visits Tennessee to sell advertisements in plaintiffs' publications. Any advertising orders are accepted and processed in Alabama.

Subscriptions to plaintiffs' publications are sold in Tennessee by two methods. First, plaintiffs receive direct subscriptions from customers in response to solicitations mailed into Tennessee from outside the state or in response to order forms in plaintiffs' publications. Second, plaintiffs receive subscriptions as a result of sales in Tennessee by third-party marketing companies, such as QSP, Inc. QSP, Inc. markets many periodicals by contract with schools and other organizations. Defendant is not claiming that plaintiffs owe sales tax on subscriptions sold through third-party vendors, only on the direct mail-order subscriptions.

#### Conclusions of Law

I. Whether plaintiffs have a sufficient nexus with Tennessee to give the defendant a constitutional basis upon which to impose a sales tax on the plaintiffs.

The decisions of the United States Supreme Court on this issue are based largely on the facts of each case. This Court must find a nexus or relationship between the activity sought to be taxed, here, mail-order subscription

sales, and the plaintiffs' activity within Tennessee. *National Geographic Society v. Cal. Bd. of Equalization*, 430 U.S. 551 (1977). For Tennessee to impose a sales tax in the absence of such a nexus would be a violation of the commerce clause, Article I, Section 8 of the United States Constitution and the due process clause of the Fourteenth Amendment of the United States Constitution.

Both plaintiffs' publications are printed in Tennessee by an independent contractor, subscriptions are solicited in the state by independent marketing companies and by solicitations mailed into the state by plaintiffs, plaintiffs' advertising sales people enter the state at regular intervals to solicit advertising and plaintiff Progressive Farmer maintains two editorial offices in Tennessee. The Court concludes that all of these activities when taken together constitute a sufficient nexus with Tennessee to give the defendant a constitutional basis upon which to impose a sales tax on plaintiffs' mail-order subscription sales.

II. Whether plaintiffs' publications qualify for the newspaper exemption provided by T.C.A. § 67-6-329(3).

Plaintiffs forcefully assert that they qualify for the newspaper exemption, T.C.A. § 67-6-329(3). There is a strong presumption against exemptions and in a suit by a taxpayer claiming exemption from taxation, the burden is on the taxpayer to clearly establish the right to the exemption. Any well-founded doubt is fatal to the taxpayer's claim. *Woods v. General Oils, Inc.*, 558 S.W.2d 433 (Tenn. 1977). Plaintiffs' exemption claim is primarily based on their argument that their publications satisfy

the definition of "newspaper" set forth in State Sales and Use Tax Regulation 1320-5-1-.46 (Rule 46). Rule 46 provides as follows:

*Publishers of newspapers, magazines, periodicals, etc.-*

(1) Sales of newspapers, whether by publishers or others, are specifically exempt from the Sales or Use Tax. Sales of papers and ink used for manufacturing these papers are sales for further processing and are also exempt from the tax.

(2) In order to constitute a newspaper, the publication must contain at least the following elements:

(a) It must be published at stated short intervals, (usually daily or weekly).

(b) It must not, when its successive issues are put together, constitute a book.

(c) It must be intended for circulation among the general public.

(d) It must contain matters of general interest or reports of current events.

(3) Notwithstanding the fact that the publication may be devoted primarily to matters of specialized interests, such as legal, mercantile, political, religious or sporting, if in addition to the special interests it serves, the alleged newspapers contain general news of the day, information of current events, and news of importance and of current interest to the general public, it is entitled to be classed as a newspaper.

(4) Sales of magazines, periodicals, and all publications other than newspapers, whether made "over the counter," or by subscription, are subject to the Sales or Use Tax.

(5) When subscriptions are placed or accepted for magazines or any other publication published in a series or serial manner, which are subject to the Sales or Use Tax, the Sales or Use Tax shall accrue and be assessed at the time of the acceptance of the subscription.

Plaintiffs' publications clearly meet the criteria presented in Rule 46(2)(b) and (2)(c). They do not, however, satisfy the requirements of Rule 46(2)(a) and (2)(d). Monthly publication is not a "short interval" as required by Rule 46(2)(a). With regard to Rule 46(2)(d), the parties have stipulated that plaintiff Southern Living's publications contain matters of general interest and reports of current events relating to the Southern region of the United States and that *Progressive Farmer* contains matters of general interest and reports of current events which relate to farming, agriculture and rural life in the United States. The Court finds that both publications are devoted exclusively to matters of localized or specialized interest. If a national disaster occurred, one would not read the news in *Southern Living*, *Creative Ideas for Living*, or *Progressive Farmer*. One would, however, be able to learn the news from the *Grundy County Herald*, another publication containing primarily matters of localized interest which nevertheless meets the definition of newspaper. Plaintiffs' publications contain no general news of the day or news of importance and of current interest to the general public as required by Rule 46(3).

In addition to the guidance provided by Rule 46, this Court may consider the common and popularly accepted usage of the term, "newspaper." *Shoppers Guide Pub. Co., Inc. v. Woods*, 547 S.W.2d 561, 563 (1977).

After consideration of the evidence and the arguments presented, the Court finds that plaintiffs have failed to carry the burden of proof, as they must, that *Southern Living*, *Creative Ideas for Living* and *Progressive Farmer* are newspapers and entitled to a sales tax exemption.

III. If plaintiffs' publications are not exempt as newspapers, whether a tax on plaintiffs' publications violates plaintiffs' constitutional guarantees of freedom of the press and freedom of expression under the First and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the Tennessee Constitution; violates the due process clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 8 of the Tennessee Constitution; violates the equal protection guarantee of the Fourteenth Amendment to the United States Constitution and Article II, Section 8 of the Tennessee Constitution.

a. freedom of the press and freedom of expression

Plaintiffs' argument rests largely on the decision of the United States Supreme Court in *Arkansas Writers' Project, Inc. v. Ragland*, 95 L. Ed. 2d 209 (1987). Arkansas's sales tax on tangible personal property including publications contained broad exemptions for newspapers and religious, professional, trade and sports journals and/or publications printed and published in Arkansas. The effect of the exemptions was to single out a small group of magazines for taxation. The United States Supreme Court held the state's selective application of its sales tax to magazines to be violative of the First Amendment

because the State failed to show that its content-based discrimination was necessary to serve a compelling state interest. The Court did not address whether the differential treatment of magazines and newspapers would invalidate the state tax.

In the present case, the sales tax exemption is more narrowly drawn than in *Ragland*. Although all newspapers are exempt, no magazines are exempt except certain religious publications, pursuant to T.C.A. § 67-6-323. The State has not singled out a small group of magazines for taxation. The compelling state interest advanced by the defendant for exempting newspapers from taxation is to further freedom of the press and to reduce regulation in the area of the press. The Court finds that the state's interest in exempting newspapers from sales tax is sufficiently compelling. The defendant's decision not to exempt other periodicals from taxation is not a violation of freedom of the press or freedom of expression as guaranteed by the constitutions of the United States and of Tennessee.

b. due process and equal protection

Discrimination as alleged by the plaintiffs with respect to the taxing and nontaxing of magazines and newspapers under the taxing laws of this state does not rise to a level of discrimination which would cause the statute to be unconstitutional under the constitutions of the United States and of Tennessee.

IV. Whether a tax on plaintiffs' nonreligious publications while exempting certain religious publications from taxation is an unconstitutional establishment of religion.

The sales tax exemption on certain religious publications is pursuant to T.C.A. § 67-6-323:

The taxes levied under this chapter shall not apply to the use, sale, or distribution of religious publications to or by churches or other religious or charitable institutions for use in the customary religious or charitable services.

The defendant's asserted purpose in exempting the sale of religious publications to or by churches for use in religious services is to avoid excessive entanglement in religion. Plaintiffs argue that any content-based discrimination violates the First Amendment, relying on *Regan v. Time, Inc.*, 468 U.S. 461, 648-49 (1984). The defendant, relying on *Waltz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970), contends that the grant of a tax exemption is not a sponsorship or establishment of religion. The defendant is simply abstaining from demanding that the church support the state. The tax exemption for religious publications sold by or to churches for use in religious services reinforces the desired separation between church and state. The Court finds the defendant's position persuasive and concludes that the exemption provided by T.C.A. § 67-6-323 is not an unconstitutional establishment of religion.

V. Whether plaintiffs' publications are exempt from tax after March 20, 1987, pursuant to T.C.A. § 67-6-329(a)(23).

T.C.A. § 67-6-329(a)(23) exempts from sales and/or use tax:

**Magazines and books which are distributed and sold to consumers by United States mail or common carrier, where the only activities of the seller or distributor in Tennessee are those activities having to do with the printing, storage, labeling and/or delivery to the United States mail or common carrier of such magazines or books, or the maintenance of raw materials with respect to such activities, notwithstanding that such seller or distributor maintains in Tennessee employees solely in connection with the production and quality control of such printing, storage, labeling and/or delivery, or in connection with news gathering and reporting.**

Based on the facts of this case, the Court concludes that plaintiffs are not exempt from the sales tax after March 20, 1987. Plaintiffs are active within the state through independent contractor marketing companies, such as QSP, Inc., and their advertising salesman who come to Tennessee to solicit advertising ten to twelve times each year.

The case will be dismissed. The attorney for the defendant will draw an order in accordance with this memorandum taxing the costs to the plaintiffs.

/s/ **Irvin H. Kilcrease, Jr.**  
**IRVIN H. KILCREASE, JR.**  
**CHANCELLOR**

April 22, 1988

cc: Charles A. Trost  
Daryle Brand

---

**APPENDIX F**

SOUTHERN LIVING, INC.	)	
VS. NO. 86-933-I	)	
KATHRYN BEHM	)	IN THE CHANCERY
CELAURO,	)	COURT FOR THE
COMMISSIONER OF	)	STATE OF TENNESSEE
REVENUE,	)	20TH JUDICIAL
STATE OF TENNESSEE	)	DISTRICT DAVIDSON
PROGRESSIVE FARMER,	)	COUNTY PART ONE
INC.	)	
VS. NO. 86-934-II(I)	)	FILED 1988 Jun 1
KATHRYN BEHM	)	
CELAURO,	)	
COMMISSIONER OF	)	
REVENUE,	)	
STATE OF TENNESSEE	)	

**MEMORANDUM**

These consolidated actions are before the Court, pursuant to Rule 52, T.R.C.P. and upon agreement of the parties, as evidence by the Agreed Order entered on May 23, 1988, in Minute Book 269, page 5. The Agreed Order moves the Court to reconsider and amend by striking the footnote on page one (1) of the Court's Memorandum filed April 22, 1988, which footnote states as follows:

Two additional issues concerning application of the local option sales tax and refund of penalty were raised by plaintiffs in their complaints. Since these issues were not presented in plaintiffs' briefs, the court will consider them waived.

Upon review of the record, the Court is of the opinion and finds that the footnote should be stricken, therefore, plaintiffs' motion to reconsider and to amend the footnote is granted.

#### Plaintiffs' Claim for Refund of Penalty

Plaintiffs, Southern Living, Inc. and Progressive Farmer, Inc., argue that they are entitled to a refund or abatement of the penalty assessed against them by the defendant Commissioner of Revenue for the State of Tennessee. Plaintiffs contend that at the time the tax liability was incurred, "it was unclear and unsettled whether its publications fit within the literal language of the regulations as being an exempt 'newspaper.' "

In *Benson v. United States Steel Corporation*, 465 S.W.2d 124, 130 (Tenn. 1971), the Court held that in tax penalty cases, the courts have the power to remit penalties, if the equities demand such remission. The Court listed four guidelines for determining which cases show good and reasonable cause for remission of the tax penalty. The plaintiffs herein rely on the third guideline:

- (3) The provisions of the pertinent law or regulations were at the time the deficiency was incurred unsettled, unclear or misleading to a reasonable person and the taxpayer acted in good faith upon a reasonable though mistaken application of such law or regulations, with the result that the tax deficiency in question was incurred.

See *Tidwell v. Goodyear Tire & Rubber Company*, 520 S.W.2d 721, 725 (Tenn. 1975); *Service Merchandise Co., Inc. v. Jackson*, 735 S.W.2d 443 (Tenn. 1987) and T.C.A. § 67-1-803(c)(1)(C).

This Court finds that plaintiffs' claim that the law was unclear and unsettled as to whether their publications were exempt newspapers and, therefore, not subject to sales tax is without merit. Plaintiffs' publications are magazines which are subject to the Sales and Use Tax. Therefore, plaintiffs' request for refund or remission of the tax penalty is denied.

#### Application of Local Option Sales Tax

Plaintiffs contend that nexus with the State of Tennessee is insufficient for the defendant's imposition of a local option sales tax on plaintiffs' publications. However, the evidence shows that plaintiff Southern Living, Inc. had its place of business at the Baird Ward Printing Company in Nashville, Davidson County, Tennessee. Plaintiff Progressive Farmer, Inc. maintained editorial offices in Memphis, Shelby County, Tennessee and in Nashville, Davidson County, Tennessee. Therefore, the Court finds that the plaintiffs were engaged in the business of making sales within the State of Tennessee, thus they are subject to the local option sales tax. The defendant has violated neither the federal nor state constitutions in imposing this tax. See *Pidgeon-Thomas Iron Company v. Garner*, 495 S.W.2d 826, 830 (Tenn. 1973). See also T.C.A. § 67-6-702.

The attorney for the defendant shall prepare an order incorporating the Court's Memorandum filed on April 22,

App. 42

1988 and the instant Memorandum. The costs are taxed to the plaintiffs.

/s/ **Irvin H. Kilcrease, Jr.**  
**IRVIN H. KILCREASE, JR.**  
**CHANCELLOR**

June 1, 1988

cc: **Charles A. Trost**  
**Daryl Brand**

---

**APPENDIX G**

**IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE**

NEWSWEEK, INC.,	)	FOR
Plaintiff/Appellant,	)	PUBLICATION
v.	)	MAY 14, 1990
KATHRYN BEHM CELAURO, COMMISSIONER OF REVENUE, STATE OF TENNESSEE,	)	DAVIDSON CHANCERY
Defendant/Appellee.	)	S/Ct No. 88-54-I FILED MAY 14 1990

**ORDER ON PETITION TO REHEAR**

The Court has carefully reviewed the grounds stated in the petition to rehear, and conclude that we have not misapprehended either the law or the facts.

The petition to rehear is denied.

Enter this 14 day of May, 1990.

**PER CURIAM**

---

**APPENDIX H**

**IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE**

SOUTHERN LIVING, INC.,	) FOR
PROGRESSIVE FARMER, INC.,	) PUBLICATION
Plaintiffs/Appellants,	) MAY 14, 1990
v.	) DAVIDSON
KATHRYN BEHM CELAURO,	) CHANCERY
COMMISSIONER OF REVENUE,	) S/Ct No. 88-53-I
STATE OF TENNESSEE,	) FILED
Defendant/Appellee.	) MAY 14 1990

**ORDER ON PETITION TO REHEAR**

The Court has carefully reviewed the grounds stated in the petition to rehear, and conclude that we have not misapprehended either the law or the facts.

The petition to rehear is denied.

Enter this 14 day of May, 1990.

██████████ PER CURIAM

---

## APPENDIX I

### TENNESSEE ADMINISTRATIVE COMPILATION

#### 1320-5-1-46 PUBLISHERS OF NEWSPAPERS, MAGAZINES, PERIODICALS.

- (1) Sales of newspapers, whether by publishers or others, are specifically exempt from the Sales or Use Tax. Sales of paper and ink used for manufacturing newspapers are sales for further processing and are also exempt from tax.
- (2) In order to constitute a newspaper, the publication must contain at least the following elements:
  - (a) It must be published at stated short intervals (usually daily or weekly).
  - (b) It must not, when its successive issues are put together, constitute a book.
  - (c) It must be intended for circulation among the general public.
  - (d) It must contain matters of general interest and reports of current events.
- (3) Notwithstanding the fact that the publication may be devoted primarily to matters of specialized interest, such as legal, mercantile, political, religious or sporting matters, if, in addition to the special interest it serves, the alleged newspaper contains general news of the day, information of current events, and news of importance and of current interest to the general public, it is entitled to be classed as a newspaper.
- (4) Sales of magazines, periodicals, and all publications other than newspapers, whether made "over the counter," or by subscription, are subject to the Sales or Use Tax.

- (5) Where subscriptions are placed or accepted for magazines or any other publication published in a series or serial manner, which are subject to the Sales or Use Tax, the Sales or Use Tax shall accrue and be assessed at the time of the acceptance of the subscription.
- (6) Publishers of books, loose leaf reports, etc., concerning banking, business, insurance, tax and other similar types of information, law, cases, etc., and concerning events such as contractor activities, social and sports events, credit etc., where there is a general distribution of the same book, report, or other publication, shall be deemed to be dealers, and such books, reports, and other publications shall be subject to the Sales and Use Tax. Where a special report is made, and no general distribution is made of the report, no Sales or Use Tax is due.
- (7) The sale or use of shoppers advertisers using newsprint distributed in this state or within a twenty-five (25) mile radius thereof at regular intervals and provided without charge to the shopper is exempt from tax.

*Authority: T.C.A. §§ 67-1-102 and 67-6-402. Administrative History: Original rule certified June 7, 1974. Amendment filed March 3, 1983; effective June 15, 1983.*

---

